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THE NEXT CONSTITUTIONAL CONVENTION OF THE UNITED STATES.

Philadelphia is one of the great cities of the world. To the student of history who remembers that Nineveh and Palmyra, Carthage and Thebes, and many another, have been great, populous and wealthy, and then have passed entirely away from the thoughts and lips of men, Philadelphia has yet a glory that shall live always. Mohammedanism has its Mecca, the cradle and the acme of its hopes. Jew and Christian alike turn to Jerusalem. But to the utmost verge of earth, and to the last syllable of recorded time, in whatever language liberty and freedom shall be honored among men, in whatever accents government "of the people, by the people and for the people" shall be asserted, there Philadelphia shall be remembered as the cradle of its birth. Her streets at some far distant day may be overgrown with grass and her ruined and tottering buildings may become the home of bats and birds of night; but around her name will linger a luster that shall never depart.

There on 4 July, 1776, was proclaimed "Liberty throughout all the land and to all the inhabitants thereof." And there too, eleven years later, was another notable event, when on 17 September, 1787, was issued to the world the Constitution of these United States. It is of the latter—"its defects and the necessity for its revision"—that I wish to present my views.

Just here it is well to call to mind the radical difference between these two Conventions. That which met in 1776 was frankly democratic. Success in its great and perilous undertaking was only possible with the support of the people. The Great Declaration was an appeal to the masses. It declared that all men were "created equal and endowed with certain inalienable rights—among them life, liberty and the pursuit of happiness—to secure which rights

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governments are instituted, deriving their just powers from the consent of the governed; and that when government becomes destructive of these ends, it is the right of the people to alter or abolish it, and institute a new government in such form as shall seem most likely to effect their safety and happiness." Never was the right of revolution more clearly asserted or that government existed for the sole benefit of the people, who were declared to be equal and endowed with the right to change their government at will when it did not subserve their welfare or obey their wishes. Not a word about property. Everything was about the people. The man was more than the dollar then. And the Convention was in earnest. Every member signed the Declaration, which was unanimously voted. As Dr. Franklin pertinently observed, it behooved them "to hang together or they would be hanged separately."

The Convention which met in 1787 was as reactionary as the other had been revolutionary and democratic. It had its beginning in commercial negotiations between the States. Wearied with a long war, enthusiasm for liberty somewhat relaxed by the pressing need to earn the comforts and necessities of life whose stores had been diminished, and oppressed by the ban upon prosperity caused by the uncertainties and impotence of the existing government of the Confederacy, the Convention of 1787 came together. Ignoring the maxim that government should exist only by the consent of the governed, it sat with closed doors, that no breath of the popular will should affect their decisions. To free the members from all responsibility, members were prohibited to make copies of any resolution. Any record of Yeas and Nays was forbidden and was kept without the knowledge of the Convention. The journal was kept secret, a vote to destroy it fortunately failed, and Mr. Madison's copy was published only after the lapse of forty-nine years, when every member had passed beyond human accountability. Only 12 States were ever represented, and one of these withdrew before the final result was reached. Of its 65 members only 55 ever attended, and so far from being unanimous, only 39 signed the Constitution, and some actively opposed its ratification by their own States.

That the Constitution thus framed was reactionary was a matter of course. There was, as we know, some talk of a royal government with Frederick, Duke of York, second son of George the Third, as King. Hamilton, whose subsequent great services as Secretary of the Treasury have crowned him with a halo, and whose tragic death has obliterated the memory of his faults, declared him-

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self in favor of the English form of government with its hereditary Executive and its House of Lords, which he denominated "a most noble institution." Failing in that, he advocated an Executive elected by Congress for life, Senators and Judges for life, and Governors of States to be appointed by the President. Of these he secured, as it has proved, the most important from his standpoint, the creation of Judges for life. The Convention was aware that a Constitution on Hamilton's lines could not secure ratification by the several States. But the Constitution adopted was made as undemocratic as possible, and was very far from responding to the condition, laid down in the Declaration of 1776, that all governments derive their just powers from the consent of the governed. Hamilton, in a speech to the Convention, stated that the members were agreed that "we need to be rescued from the democracy." They were rescued.

In truth, the consent of the governed was not to be asked. In the new government the will of the people was not to control and was little to be consulted. Of the three great departments of the government—Legislative, Executive, and Judiciary—the people were entrusted with the election only of the House of Representatives, to wit, only one-sixth of the government, even if that House had been made equal in authority and power with the Senate, which was very far from being the case. The Declaration of 1776 was concerned with the rights of man. The Convention of 1787 entirely ignored them. There was no Bill of Rights and the guarantees of the great rights of freedom of speech and of the press, freedom of religion, liberty of the people to assemble, and right of petition, the right to bear arms, exemption from soldiers being quartered upon the people, exemption from general warrants, the right of trial by jury and a grand jury, protection of the law of the land and protection from seizure of private property for other than public use, and then only upon just compensation; the prohibition of excessive bail or cruel and unusual punishment, and the reservation to the people and the States of all rights not granted by the Constitution—all these matters of the utmost importance to the rights of the people —were omitted and were inserted by the first ten amendments only because it was necessary to give assurances that such amendments would be adopted in order to secure the ratification of the Constitution by the several States.

The Constitution was so far from being deemed satisfactory, even to the people and in the circumstances of the time for which it was framed, that, as already stated, only 11 States voted for its

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adoption by the Convention, and only 39 members out of 55 attending signed it, some members subsequently opposing its ratification. Its ratification by the conventions in the several States was carried with the greatest difficulty, and in no State was it submitted to a vote of the people themselves. Massachusetts ratified only after a close vote and with a demand for amendments. South Carolina and New Hampshire also demanded amendments, as also did Virginia and New York, both of which voted ratification by the narrowest majorities and reserving to themselves the right to withdraw, and two States rejected the Constitution and subsequently ratified only after Washington had been elected and inaugurated—matters in which they had no share.

George Washington was President of the Convention, it is true, but as such was debarred from sharing in the debates. His services, great as they were, had been military, not civil, and he left no impress upon the instrument of union so far as known. Yet it was admitted that but for his popularity and influence the Constitution would have failed of ratification by the several States, especially in Virginia. Indeed, but for his great influence the Convention would have adjourned without putting its final hand to the Constitution, as it came very near doing. Even his great influence would not have availed but for the overwhelming necessity for some form of government as a substitute for the rickety "Articles of Confederation," which were utterly inefficient and whose longer retention threatened civil war.

An instrument so framed, adopted with such difficulty and ratified after such efforts, and by such narow margins, could not have been a fair and full expression of the consent of the governed. The men that made it did not deem it perfect. Its friends agreed to sundry amendments, ten in number, which were adopted by the first Congress that met. The assumption by the new Supreme Court of a power not contemplated, even by the framers of the Constitution, to drag a State before it as defendant in an action by a citizen of another State, caused the enactment of the Eleventh Amendment. The unfortunate method prescribed for the election of President nearly caused a civil war in 1801 and forced the adoption of the Twelfth Amendment, and three others were brought about as the result of the great Civil War. The Convention of 1787 recognized itself that the defects innate in the Constitution and which would be developed by experience and the lapse of time, would require amendments, and that instrument prescribed two different methods by which amendments could be made.

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Our Federal Constitution was adopted 119 years ago. In that time every State has radically revised its Constitution, and most of them several times. Indeed, the Constitution of New York requires that the question of a Constitutional Convention shall be submitted to its people at least once every twenty years. The object is that the organic law shall keep abreast of the needs and wants of the people and shall represent the will and progress of to-day, and shall not, as is the case with the Federal Constitution, be hampered by provisions deemed best by the divided counsels of a small handful of men, in providing for the wants of the government of nearly a century and a quarter ago. Had those men been gifted with divine foresight and created a Constitution fit for this day and its development, it would have been unsuited for the needs of the times in which it was fashioned.

When the Constitution was adopted in 1787 it was intended for 3,000,000 of people, scattered along the Atlantic slope, from Massachusetts to the southern boundary of Georgia. We are now trying to make it do duty for very nearly 100,000,000, from Maine to Manila, from Panama and Porto Rico to the Pole. Then our population was mostly rural, for three years later, at the first Census in 1790, we had but five towns in the whole Union which had as many as 6,500 inhabitants each, and only two others had over 4,000. Now we have the second largest city on the globe, with over 4,000,000 of inhabitants, and many that have passed the half million mark, some of them of over a million population. Three years later, in 1790, we had 75 post-offices with $37,000 annual post-office expenditures. Now we have 75,000 post-offices, 35,000 rural delivery routes and a post-office appropriation of nearly $200,000,000.

During the first ten years the total expenditures of the Federal Government, including payments on the Revolutionary debts, and including even the pensions, averaged $10,000,000 annually. Now the expenditures are seventy-five times as much. When the Constitution was adopted Virginia was easily the first State in influence, population and wealth, having one-fourth the population of the entire Union. North Carolina was third, and New York, which then stood fifth, now has double the population of the whole country at that date, and several other States have now a population greater than the original Union, whose very names were then unheard and over whose soil the savage and the buffalo roamed unmolested. Steamboats, railroads, gas, electricity (except as a toy in Franklin's hands), coal mines, petroleum, and a thousand other things which are a part of our lives to-day, were undiscovered.

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Corporations, which now control the country and its government, were then so few that not till four years later, in 1791, was the first bank incorporated (in New York), and the charter for the second bank was only obtained by the subtlety of Aaron Burr, who concealed the banking privileges in an act incorporating a water company—and corporations have had an affinity for water ever since.

Had the Constitution been perfectly adapted to the needs and wishes of the people of that day, we would still have outgrown it. Time has revealed flaws in the original instrument, and it was, as might be expected, wholly without safeguards against that enormous growth of corporations, and even of individuals, in wealth and power, which has subverted the control of the government.

The glaring defect in the Constitution was that it was not democratic. It gave, as already pointed out, to the people—to the governed—the selection of only one-sixth of the government, to wit, one-half—by far the weaker half—of the Legislative Department. The other half, the Senate, was made elective at second hand by the State Legislatures, and the Senators were given not only longer terms, but greater power, for all Presidential appointments, and treaties, were subjected to confirmation by the Senate.

The President was intended to be elected at a still further remove from the people, by being chosen by electors, who, it was expected, would be selected by the State Legislatures. The President thus was to be selected at third hand, as it were. In fact, down till after the memorable contest between Adams, Clay, Crawford and Jackson, in 1824, in the majority of the States the Presidential electors were chosen by the State Legislatures, and they were so chosen by South Carolina till after the Civil War, and, in fact, by Colorado in 1876. The intention was that the electors should make independent choice, but public opinion forced the transfer of the choice of electors from the Legislatures to the ballot-box, and then made of them mere figure-heads, with no power but to voice the will of the people, who thus captured the Executive Department. That Department, with the House of Representatives, mark to-day the extent of the share of the people in this government.

The Judiciary were placed a step still further removed from the popular choice. The Judges were to be selected at fourth hand by a President (intended to be selected at third hand) and subject to confirmation by a Senate chosen at second hand. And to make the Judiciary absolutely impervious to any consideration of the "consent of the governed," they are appointed for life.

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It will be seen at a glance that a Constitution so devised was intended not to express, but to suppress, or at least disregard, the wishes and the consent of the governed. It was admirably adapted for what has come to pass—the absolute domination of the government by the "business interests" which, controlling vast amounts of capital and intent on more, can secure the election of Senators by the small constituencies, the Legislatures which elect them, and can dictate the appointment of the Judges, and if they fail in that, the Senate, chosen under their auspices, can defeat the nomination. Should the President favor legislation and the House of Representatives pass the bill, the Senate, with its majority chosen by corporation influences, can defeat it; and if by any chance it shall yield to the popular will and pass the bill, as was the case with the income tax, there remains the Judiciary, who have assumed, without any warrant, express or implied in the Constitution, the power to declare any act unconstitutional at their own will and without responsibility to any one.

The people's part in the government in the choice of the House of Representatives, even when reinforced by the Executive, whose election they have captured, is an absolute nullity in the face of the Senate and the Judiciary, in whose selection the people have no voice. This, therefore, is the government of the United States—a government by Senate and Judges—that is to say, frankly, by whatever power can control the selection of Senators and Judges. What is that power? We know that it is not the American people.

Let us not be deceived by forms, but look at the substance. Government rests not upon forms, but upon a true reply to the question, "Where does the governing power reside?" The Roman legions bore to the last day of the empire upon their standards the words, "The Senate and the Roman People," long centuries after the real power had passed from the *curia* and the *comitia* to the barracks of the Pretorian Guards, and when there was no will in Rome save that of their master. There were still Tribunes of the People, and Consuls, and a Senate, and the title of a Republic; but the real share of the people in the Roman government was the donation to them of "bread and circuses" by their tyrants.

Years after the victor of Marengo had been crowned Emperor and the sword of Austerlitz had become the one power in France, the French coins and official documents still bore the inscription of "French Republic"—"République Francaise."

In England to-day there is a monarchy in form, but we know that in truth the real government of England is vested in a single

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House of Parliament, elected by the people, under a restricted suffrage; that the real Executive is not the King, but the Prime Minister and his cabinet, practically elected by that House of Commons; that the King has not even the veto power, except nominally, since it has not been exercised in a single instance for more than 200 years, and that the sole function of the House of Lords—a club of rich men representing great vested interests—is in the exercise of a suspensive veto (of which the King has been deprived), which is exercised only till the Commons make up their mind the bill shall pass—when the House of Lords always gives way, as the condition upon which their continued existence rests. So in this country, we retain the forms of a Republic. We still choose our President and the House of Representatives by the people; but the real power does not reside in them or in the people. It rests with those great "interests" which select the majority of the Senate and the Judges.

This being the situation, the sole remedy possible is by amendment of the Constitution to make it democratic, and place the selection of these preponderating bodies in the hands of the people.

First, the election of Senators should be given to the people. Even then consolidated wealth will secure some of the Senators; but it would not be able, as now, at all times to count with absolute certainty upon a majority of the Senate as its creatures. Five times has a bill, proposing such amendment to the Constitution, passed the House of Representatives by a practically unanimous vote, and each time it has been lost in the Senate; but never by a direct vote. It has always been disposed of by the chloroform process of referring the bill to a committee, which never reports it back, and never will. It is too much to expect that the great corporations which control a majority of the Senate will ever voluntarily transfer to the people their profitable and secure hold upon supreme power by permitting the passage of an amendment to elect Senators by the people. The only hope is in the alternative plan of amendment, authorized by the Constitution, to wit, the call of a Constitutional Convention upon the application of two-thirds of the States, to wit, thirty States. More than that number have already instructed in favor of an amendment to elect Senators by the people.

It may be recalled here that in the Convention of 1787 Pennsylvania did vote for the election of Senators by the people. A strong argument used against this was that the farming interest, being the largest, would control the House and that the Senate could only be given to the commercial interests by making its members elective by the Legislatures—which was prophetic—though the

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deciding influence was the fear of the small States that if the Senate was elected by the people its membership would be based on population.

It is high time that we had a Constitutional Convention, after the lapse of nearly a century and a score of years. The same reasons which have time and again caused the individual States to amend their Constitutions imperatively require a Convention to adjust the Constitution of the Union to the changed conditions of the times and to transfer to the people themselves that control of the government which is now exercised for the profit and benefit of the "interest." Those interests, with all the power of their money and the large part of the press which they own or control, will resist the call of such a Convention. They will be aided, doubtless, by some of the smaller States who may fear a loss of their equal representation in the Senate. But in truth and justice it may be that there might be some modification now in that respect without injury to the smaller States. There is no longer any reason why Delaware, or Nevada, or Rhode Island should have as many Senators as New York, or Pennsylvania, or Illinois. It would be enough to grant to every State having a million of inhabitants or less, one Senator, and to allot to each State having over one million of inhabitants an additional Senator for every million above one million and for a fractional part if over three-quarters of a million. This, while not putting the Senate frankly on the basis of population, would remove the dissatisfaction with the present unjust ratio and would quiet the opposition to the admission of new States whose area and development entitle them to self-government, but whose population does not entitle them to two Senators.

The election of President is now made by the people, who have captured it, though the Constitution did not intend the people should have any choice in naming the Executive. The dangerous and unsafe plan adopted in 1787 was changed in consequence of the narrowly-averted disaster in 1801. But the method in force still leaves much to be desired. It readily lends itself to the choice of a minority candidate. It is an anomaly that 1,100 votes in New York (as in 1884) should swing 70 electoral votes (35 from one candidate to the other) and thus decide the result. The consequence is that while, nominally, any citizen of the Republic is eligible to the Presidency, only citizens of two or three of the larger States, with doubtful electoral votes, are in fact eligible. All others are barred. For proof of this, look at the history of our Presidential electors. For the first forty years of the Union the presidents were confined to

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two States—Virginia and Massachusetts. Then there came a period when the growing West required recognition, and Tennessee, Ohio, and New York commanded the situation for the next sixteen years. The Mexican War gave us a soldier who practically represented no State, and was succeeded by a New Yorker. Then for the only time in our history "off States" had a showing, and Pennsylvania and New Hampshire had their innings. Since then the successful candidates have been again strictly limited to "pivotal States"—New York in the East and Illinois, Indiana and Ohio in the West.

This condition is unsatisfactory. The magnetic Blaine from Maine was defeated, as was Bryan from Nebraska. Had the former hailed from New York and the latter from Illinois, the electoral votes and influence of those States would have secured their election.

It would be dangerous, and almost a certain provocation of civil war, to change the election of President to a per capita vote by the whole of the Union. Then a charge of a fraudulent vote at any precinct or voting place, however remote, might affect the result; and as frauds would most likely occur in those States where the majorities are largest—as in Pennsylvania or Texas, Ohio or Georgia—a contest would always be certain. Whereas, now, frauds in States giving large majorities, unless of great enough magnitude to change the electoral vote of the whole State, can have no effect. The remedy is, preserving the electoral vote system as now, and giving the smaller States, as now, the advantage of electoral votes to represent their Senators, to divide the electoral vote of each State according to the popular vote for each candidate, giving each his pro rata of the electoral vote on that basis, the odd elector being apportioned to the candidate having the largest fraction. Thus in New York, Mr. Blaine would have gotten 17 electoral votes and Mr. Cleveland 18. Other States would have also divided, more or less evenly; but the result would be that the choice of President would no longer be restricted to two or three States, as in our past history, and is likely to be always the case as long as the whole electoral vote of two or three large pivotal States must swing to one side or other and determine the result. This change would avoid the present evil of large sums being spent to carry the solid electoral vote of "pivotal" States, for there would cease to be "pivotal" States. At the same time this would avoid the open gulf into which a per capita ballot by the whole Union would lead us. While the electoral vote of a State should be divided, pro

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rata, according to the popular vote for each candidate, it is essential that each State should vote as one district, since its boundaries are unchangeable. To permit the Legislature of each State to divide it into electoral districts would simply open up competition in the art of gerrymandering.

By the Convention of 1787 the term of the President was originally fixed at seven years and he was made ineligible for re-election. This was reduced to four years by a compromise that he could be re-elected without limitation. This was done in the interest of those who favored a strong government and a long tenure. Washington imposed a limitation by his example which will not always be binding. An amendment making the term six years and the President ineligible to re-election has long been desired by a large portion of the pubic. Indeed, when the Constitutional Convention of the Union shall assemble, as it must do some day, to remodel our Constitution to fit it to face the dangers and conform to the views of the people of this age, with the aid of our experience, in the past, it is more than probable that the powers of the Executive will be more restricted. His powers are now greater than those of any sovereign in Europe. The real restrictions upon Executive power at present are not in Constitutional provisions, but in the Senate and Judiciary, which often negative the popular will, which he represents more accurately than they.

And now we come to the most important of the changes necessary to place the government of the Union in the hands of the people. By far the most serious defect and danger in the Constitution is the appointment of Judges for life, subject to confirmation by the Senate. It is a far more serious matter than it was when the Convention of 1787 framed the Constitution. A proposition was made in the Convention—as we now know from Mr. Madison's Journal—that the Judges should pass upon the constitutionality of acts of Congress. This was defeated 5 June, receiving the vote of only two States. It was renewed no less than three times, *i. e.*, on 6 June, 21 July, and finally again for the fourth time on 15 August; and though it had the powerful support of Mr. Madison and Mr. James Wilson, at no time did it receive the votes of more than three States. On this last occasion (15 August) Mr. Mercer thus summed up the thought of the Convention: "He disapproved of the doctrine, that the Judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be incontrovertible."

The subsequent action of the Supreme Court in assuming the

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power to declare acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication. The Constitution recited carefully and fully the matters over which the courts should have jurisdiction, and there is nothing, and after the above vote four times refusing jurisdiction there could be nothing, indicating any power to declare an act of Congress unconstitutional and void.

Had the Convention given such power to the courts, it certainly would not have left its exercise final and unreviewable. It gave the Congress power to override the veto of the President, though that veto was expressly given, thus showing that in the last analysis the will of the people, speaking through the legislative power, should govern. Had the Convention supposed the courts would assume such power, it would certainly have given Congress some review over judicial action and certainly would not have made the Judges irretrievably beyond "the consent of the governed" and regardless of the popular will by making them appointive, and further clothing them with the undemocratic prerogative of tenure for life.

Such power does not exist in any other country, and never has. It is, therefore, not essential to our security. It is not conferred by the Constitution, but, on the contrary, the Convention, as we have seen, after the fullest debate, four times, on four several days, refused by a decisive vote to confer such power. The Judges not only have never exercised such power in England, where there is no written Constitution, but they do not exercise it in France, Germany, Austria, Denmark, or in any other country which, like them, has a written Constitution.

A more complete denial of popular control of this government could not have been conceived than the placing such unreviewable power in the hands of men, not elected by the people, and holding office for life. The legal-tender act, the financial policy of the government, was invalidated by one court and then validated by another, after a change in its *personnel.* Then the income tax, which had been held constitutional by the Court for an hundred years, was again so held, and then by a sudden change of vote by one Judge it was held unconstitutional, nullified and set at naught, though it had passed by a nearly unanimous vote both Houses of Congress, containing many lawyers who were the equals, if not the superiors of the vacillating Judge, and had been approved by the President and voiced the will of the people. This was all negatived (without any warrant in the Constitution for the Court to set aside an act of Congress) by the vote of one Judge; and thus one

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hundred million dollars, and more, of annual taxation, was transferred from those most able to bear it and placed upon the backs of those who already carried more than their fair share of the burdens of government. Under an untrue assumption of authority given by thirty-nine dead men one man nullified the action of Congress and the President and the will of seventy-five millions of living people, and in the thirteen years since has taxed the property and labor of the country, by his sole vote, $1,300,000,000, which Congress, in compliance with the public will and relying on previous decisions of the Court, had decreed should be paid out of the excessive incomes of the rich.

In England one-third of the revenue is derived from the superfluities of the very wealthy, by the levy of a graduated income tax, and a graduated inheritance tax, increasing the per cent with the size of the income. The same system is in force in all other civilized countries. In not one of them would the hereditary monarch venture to veto or declare null such a tax. In this country, alone, the people, speaking through their Congress, and with the approval of their Executive, cannot put in force a single measure of any nature whatever with assurance that it shall meet with the approval of the courts; and its failure to receive such approval is fatal, for, unlike the veto of the Executive, the unanimous vote of Congress (and the income tax came near receiving such vote) cannot avail against it. Of what avail shall it be, if Congress shall conform to the popular demand and enact a "Rate Regulation" bill and the President shall approve it, if five lawyers, holding office for life and not elected by the people, shall see fit to destroy it, as they did the income tax law? Is such a government a reasonable one, and can it be longer tolerated after 120 years of experience have demonstrated the capacity of the people for self-government? If five lawyers can negative the will of 100,000,000 of men, then the art of government is reduced to the selection of those five lawyers.

A power without limit, except in the shifting views of the Court, lies in the construction placed upon the Fourteenth Amendment, which passed, as every one knows, solely to prevent discrimination against the colored race, has been construed by the Court to confer upon it jurisdiction to hold any provision of any statute whatever "not due process of law." This draws the whole body of the reserved rights of the States into the maelstrom of the Federal Courts, subject only to such forbearance as the Federal Supreme Court of the day, or in any particular case, may see fit to exercise. The limits between State and Federal jurisdiction depend upon the

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views of five men at any given time; and we have a government of men and not a government of laws, prescribed beforehand.

The preservation of the autonomy of the several States and of local self-government is essential to the maintenance of our liberties, which would expire in the grasp of a consolidated despotism. Nothing can save us from this centripetal force but the speedy repeal of the Fourteenth Amendment or a recasting of its language in terms that no future court can misinterpret it.

The vast political power now asserted and exercised by the court to set aside public policies, after their full determination by Congress, cannot safely be left in the hands of any body of men without supervision or control by any other authority whatever. If the President errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot-box for his stewardship. If members of Congress err, they too must account to their constituents. But the Federal Judiciary hold for life, and though popular sentiment should change the entire *personnel* of the other two great departments of government, a whole generation must pass away before the people could get control of the Judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments—irresponsible because impeachment has become impossible, and if it were possible, it could not be invoked as to erroneous decisions, unless corruption were shown.

The control of the policy of government is thus not in the hands of the people, but in the power of a small body of men not chosen by the people and holding for life. In many cases which might be mentioned, had the Court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision as in the income tax case, long ere this, under the tenure of a term of years, new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of Congress to control the financial policy of the government in accordance with the will of the people of this day and age, and not according to the shifting views which the Court has imputed to language used by the majority of the fifty-five men who met in Philadelphia in 1787. Such methods of controlling the policy of a government are no whit more tolerable than the conduct of the augurs of old who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky—the

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rules of such divination being in their own breasts and hence their decisions beyond remedy.

It may be that this power in the courts, however illegally grasped originally, has been too long acquiesced in to be now questioned. If so, the only remedy which can be applied is to make the Judges elective, and for a term of years, for no people can permit its will to be denied, and its destinies shaped, by men it did not choose and over whose conduct it has no control, by reason of its having no power to change them and select other agents at the close of a fixed term.

Every Federal Judgeship below the Supreme Court can be abolished by an act of Congress, since the power which creates a Federal district or circuit can abolish it at will. If Congress can abolish one, it can abolish all. Several districts have from time to time been abolished, notably two in 1801; and we know that the sixteen Circuit Judges created by the Judiciary Act of 1801 were abolished eighteen months later.

It is true that under the stress of a great public sentiment every United States District and Circuit Judge can be legislated out of office by a simple act of Congress, and a new system recreated with new Judges. It is also true, as has been pointed out by distinguished lawyers, that while the Supreme Court cannot be thus abolished, it exercises its appellate functions "with such exceptions and under such regulations as Congress shall make" (Const., Art. III, sec. 2), and as Congress enacted the Judiciary Act of 1789, it has often amended it, and can repeal it. Judge Marshall recognized this in *Marbury v. Madison,* in which case in an *obiter* opinion he had asserted the power to declare an act of Congress unconstitutional, for he wound up by refusing the logical result, the issuing of the mandamus sought, because Congress had not conferred jurisdiction upon the Supreme Court to issue it.

In 1831 the attempt was made to repeal section 25 of the Judiciary Act of 1789, by virtue of which writs of error lay to the State Supreme Courts in certain cases. Though the section was not repealed, the repeal was supported and voted for by both Henry Clay, James K. Polk, and other leaders of both of the great parties of that day. But what is needed is not the exercise of these powers which Congress undoubtedly possesses and in an emergency will exercise, but a constitutional revision by which the Federal Judges, like other public servants, shall be chosen by the people for a term of years.

It may be said that the Federal Judges are now in office for life

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and it would be unjust to dispossess them. So it was with the State Judges in each State when it changed from life Judges to Judges elected by the people; but that did not stay the hand of a much-needed reform.

It must be remembered that when our Federal Constitution was adopted in 1787, in only one State was the Governor elected by the people, and the Judges in none, and that in most, if not all, the States, the Legislature, especially the Senate branch, was chosen by a restricted suffrage. The schoolmaster was not abroad in the land, the masses were illiterate and government by the people was a new experiment and property-holders were afraid of it. The danger to property rights did not come then, as now, from the other direction—from the corporations and others holding vast accumulations of capital and by its power threatening to crush those owning modest estates.

In the State governments the conditions existing in 1787 have long since been changed. In all the States the Governor and the members of both branches of the Legislature have long since been made elective by manhood suffrage. In all the forty-five States save four (Delaware, Massachusetts, New Hampshire, and Rhode Island), the Judges now hold for a term of years, and in three of these they are removable (as in England) upon a majority vote of the Legislature, thus preserving a supervision of their conduct which is utterly lacking as to the Federal Judiciary. In Rhode Island the Judges were thus dropped summarily, once, when they had held an act of the Legislature invalid. In thirty-three States the Judges are elected by the people, in five States by the Legislature and in seven States they are appointed by the Governor with the consent of the Senate. Even in England the Judges hold office subject to removal upon the vote of a bare majority in Parliament—though there the Judges have never asserted any power to set aside an act of Parliament. There the will of the people, when expressed through their representatives in Parliament, is final. The King cannot veto it, and no Judge has ever dreamed he had power to set it aside.

There are those who believe and have asserted that corporate wealth can assert such influence that even if Judges are not actually selected by the great corporations, no Judge can take his seat upon the Federal bench if his nomination and confirmation are opposed by the allied plutocracy. It has never been charged that such Judges are corruptly influenced. But the passage of a Judge from the bar to the bench does not necessarily destroy his prejudices or

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his predilections. If they go upon the bench knowing that this potent influence if not used for them, at least withheld its opposition to their apppointment, or their confirmation, and usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims, this will unconsciously, but effectively, be reflected in the decisions they make. Having attempted as lawyers to persuade courts to view debated questions from the standpoint of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench. This trend in Federal decisions has been pronounced. Then, too, incumbents of seats upon the Federal Circuit and District bench cannot be oblivious to the influence which procures promotion; and how fatal to confirmation by the plutocratic majority in the Senate will be the expression of any judicial views not in accordance with the "safe, sane and sound" predominance of wealth.

As far back as 1820, Mr. Jefferson had discovered the "sapping and mining," as he termed it, of the life-tenure, appointive Federal Judiciary, owing no gratitude to the people for their appointment and fearing no inconvenience from their conduct, however arbitrary, in the discharge of such office. In short, they possess the autocratic power of absolute irresponsibility. "Step by step, one goes very far," says the French proverb. This is true of the Federal Judiciary. Compare their jurisdiction in 1801, when Marshall ascended the bench, and their jurisdiction in 1906. The Constitution has been remade and rewritten by the judicial glosses put upon it. Had it been understood in 1787 to mean what it is construed to mean to-day, it is safe to say that not a single State would have ratified it.

An elective Judiciary is less partisan, for in many States half the Judges are habitually taken from each party, and very often in other States the same men are nominated by both parties, as notably the recent selection by a Republican convention of a Democratic successor to Judge Parker. The organs of plutocracy have asserted that in one State the elective Judges are selected by the party boss. But they forget that if that is true, he must in such a condition of affairs name the Governor too, and through the Governor he would select the appointive Judges. If the people are to be trusted to select the Executive and the Legislature, they are fit to select the Judges. The people are wiser than the appointing power which, viewing Judgeships as patronage, has with scarcely an exception

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filled the Federal bench with appointees of its own party. Public opinion, which is the corner-stone of free government, has no place in the selection or supervision of the judicial augurs who assume power to set aside the will of the people when declared by Congress and the Executive. Whatever their method of divination, equally with the augurs of old they are a law to themselves and control events.

As was said by a great lawyer lately deceased, Judge Seymour D. Thompson, in 1891 (25 Am. Law Review, 288): "If the proposition to make the Federal Judiciary elective instead of appointive is once seriously discussed before the people, *nothing can stay the growth of that sentiment,* and it is almost certain that every session of the Federal Supreme Court will furnish material to stimulate that growth."

Great aggregations of wealth know their own interests, and it is very certain that there is no reform and no constitutional amendment that they will oppose more bitterly than this. What, then, is the interest of all others in regard to it?

Another undemocratic feature of the Constitution is that which requires all Federal officials to be appointed by the President or heads of departments. This is a great evil. Overwhelming necessity has compelled the enactment of the civil service law, which has protected many thousands of minor officials. But there has been no relief as to the 75,000 postmasters. When the Constitution was adopted there were only 75 postmasters, and it was contemplated that the President or Postmaster-General would really appoint. But this constitutional provision is a dead letter. The selection of this army of 75,000 postmasters, in a large majority of cases, is made by neither, but in the unconstitutional mode of selection by Senator, Member of the House, or a political boss. There is no reason why Congress should not be empowered by amendment to authorize the Department to lay off the territory patronizing each post-office as a district in which an election shall be held once in four years, at the time a member of Congress is chosen, and by the same machinery, the officer giving bond and being subject to the same supervision as now. Thus the people of each locality will get the postmaster they prefer, irrespective of the general result in the Union, relieving the Department at Washington of much call upon its time, which can be used for the public interest in some better way; and, besides, it will remove from the election of President and Members of Congress considerations of public patronage. Elec-

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tions will then more largely turn upon the great issues as to matters of public policy.

Another obstruction to the effective operation of the popular will is the fact that, though Congressmen are elected in November, they do not take their seats (unless there is a called session) for thirteen months, and in the meantime the old Congress, whose policy may have been repudiated at the polls, sits and legislates in any event till 4 March following. This surely needs amendment, which fortunately can be done by statute. In England, France and other countries the old Parliament ceases before the election, and the new Assembly meets at once and puts the popular will into law.

In thus discussing the defects of the Federal Constitution I have but exercised the right of the humblest citizen. Few will deny that defects exist. I have indicated what, in my opinion, are the remedies. As to this, many will differ. If better can be found, let us adopt them. But could the matter be more appropriately discussed than on the spot where the original Constitution was debated?

For my part, I believe in popular government. The remedy for the halting, half-way popular government which we have is more democracy. When some one observed to Mr. Gladstone that the "people are not always right," he replied, "No; but they are rarely wrong." When they are wrong, their intelligence and their interests combine to make them correct the wrong. But when rulers, whether Kings, or life Judges, or great corporations, commit an error against the interest of the masses, there is no such certainty of correction.

The growth of this country in population and in material wealth has made it the marvel of the ages.

> **" But what avail the plow or sail,**
> **Or land or life, if freedom fail?"**

The government and the destinies of a great people should always be kept in their own hands.

Walter Clark, LL.D.

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